SERVED: April 18, 1997

NTSB Order No. EA-4542

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 18th day of April, 1997

BARRY L. VALENTINE, Acting Administrator, Federal Aviation Administration, Complainant, v. JOHN J. GILJAM, Respondent.	Docket SE-14790

OPINION AND ORDER

The respondent has appealed from the oral initial decision Administrative Law Judge William E. Fowler, Jr., rendered in this proceeding on March 7, 1997, at the conclusion of an evidentiary hearing.[1] By that decision the law judge affirmed an emergency order of the Administrator that revoked respondent's private pilot certificate (No. 084586162) on allegations that he had

[1]An excerpt from the hearing transcript containing the initial decision is attached.

violated sections 43.12(a), 91.405(a) and (b), and 91.7(a) of the Federal Aviation Regulations ("FAR"), 14 C.F.R. Parts 43 and 91.[2] For the reasons discussed below, the appeal will be denied.

The charges in the Administrator's January 28, 1997 Emergency Order of Revocation, as amended February 20, rest principally on the following alleged facts and circumstances concerning the respondent:

> 2. At all relevant times herein, Hill Top Welding, Inc. owned a Piper PA-23-250 aircraft,

[2]FAR sections 43.12(a), 91.7(a), and 91.405(a) and (b) provide as follows:

§ 43.12 Maintenance records: Falsification, reproduction, or alteration.

(a) No person may make or cause to be made:
(1) Any fraudulent or intentionally false entry in any record or report that is required to be made, kept, or used to show compliance with any requirement under this part;
(2) Any reproduction, for fraudulent purpose, of any record or report under this part; or
(3) Any alteration, for fraudulent purpose, of any record or report under this part.

§ 91.7 Civil aircraft airworthiness.

(a) No person may operate an aircraft unless it is in an airworthy condition.

§ 91.405 Maintenance required.

Each owner or operator of an aircraft--
(a) Shall have that aircraft inspected as prescribed in subpart E of this part and shall between required inspections, except as provided in paragraph (c) of this section, have discrepancies repaired as prescribed in part 43 of the chapter;
(b) Shall ensure that maintenance personnel make appropriate entries in the aircraft maintenance records indicating the aircraft has been approved for return to service....

identification number N54748.

3. At all relevant times herein, you acted as President of Hill Top Welding, Inc.

4. On or about December 21, 1995, the Federal Aviation Administration (FAA) placed an Aircraft Condition Notice on the aircraft described above, stating the following:

> "1. The items listed below are considered to be an imminent hazard to safety."
>
> "2. Operation of the aircraft prior to correction will be contrary to pertinent Federal Aviation Regulations."
>
> "3. A Special Flight Permit will be required to be issued prior to operation if corrective action has not been taken."
>
> * * *
>
> "Found fuel leaking (drip) from under fuselage at wing root area. This condition must be corrected before further flight."

5. As a result, the aircraft described above was not in an airworthy condition.

6. You thereafter operated the aircraft described above on a flight from Danville [sic, Dansville], New York to Lima, New York (in the vicinity of Geneseo, New York) when it was not in an airworthy condition; without a special flight permit; without the condition or discrepancy described above being corrected or inspected; and without an entry made in the maintenance records that the condition or discrepancy was corrected or inspected.

7. On or about August 23, 1996, the Federal Aviation Administration (FAA) granted you and Hill Top Welding, Inc. permission, in a Special Flight Permit, to ferry the aircraft described above from Geneseo, New York to Syracuse, New York with the condition that you must have certification in the log book from a mechanic that the aircraft is safe to ferry to the destination.

8. The Special Flight Permit described above contained the following Operating Limitation:

> 7. The Special Airworthiness Certificate/Special Flight Permit is not valid unless the aircraft is inspected to the extent necessary to determine that it is safe for the intended purpose with respect to safety of flight. Such inspection must be accomplished by an appropriately certificated mechanic or repair station and the inspection must be recorded in the aircraft logbooks.

9. At all relevant times herein, the required inspection described above was not accomplished.

10. At all relevant times herein, there was no entry made in the aircraft maintenance records indicating the aircraft had been inspected or approved for return to service.

11. On or about August 30, 1996, you operated the aircraft described above on a flight to Syracuse, New York.

12. As a result, you operated the aircraft described above on a flight to Syracuse, New York when it was not in an airworthy condition; without a special flight permit; without the condition or discrepancy described above being corrected or inspected; and without an entry made in the maintenance records that the condition or discrepancy was corrected or inspected.

* * *

15. On or about October 15, 1996, you submitted to the FAA, upon its request, a handwritten document as a record that the required inspection for the special flight permit described above was accomplished before the August 30, 1996 flight to Syracuse, New York.

16. The handwritten document you submitted to the FAA states the following:

> To whom it may concern...Prior to a flight of N54748 to Syracuse for repairs I have inspected the fuel tanks in question and observed no signs of fuel leaking or any unsafe conditions, therefore I believe this aircraft was safe to ferry. Stephen K. Crowley...A&P Cert.#205608318.

17. Stephen K. Crowley did not write the handwritten document described above, and did not cause it to be written.

18. Stephen K. Crowley did not perform the inspection described in the handwritten document described above, and did not cause it to be performed.

The law judge found the evidence sufficient to warrant affirmance of all of the charges predicated on these allegations. Respondent's arguments on appeal, which raise both procedural and substantive issues, establish no basis for disturbing the law judge's decision.

Respondent contends that his due process rights were negatively affected in this proceeding because, in his view, the law judge did not properly discharge his duty under our rules of practice during the prehearing discovery phase of the case. Specifically, respondent maintains that the law judge committed prejudicial error by not ruling on a February 14 motion respondent had filed for expedited discovery, which sought an order directing the Administrator to respond to respondent's discovery requests, filed February 12, no later than February 20. Because of this asserted failure by the law judge, respondent maintains, he could not effectively rebut, through cross examination or additional evidence, matters that were not revealed until the hearing. We think the record demonstrates that respondent, notwithstanding his discovery-related objections, was accorded a fair hearing, with full opportunity to challenge every facet of the Administrator's case.

Aside from the fact that our rules of practice do not

contemplate that orders compelling discovery would be sought, or issued, in the absence of a refusal to comply with a discovery request or some other dispute concerning a discovery matter which the parties could not resolve without a law judge's intervention, respondent does not argue that the information the Administrator actually provided him *on February 20* did not, based on the Administrator's judgment as of that date on how to try the case, adequately answer the interrogatories and requests for production respondent had previously served.[3] His position, rather, appears to be that if his motion had been granted, the Administrator would have somehow been precluded, at the hearing, from calling two inspector witnesses not identified on February 20 and from introducing the documents one of them sponsored that had not been produced earlier. Respondent is mistaken.

An order from the law judge directing the Administrator to respond to respondent's discovery requests by February 20, or any other date prior to the hearing, would not have precluded the Administrator from subsequently seeking, even after the hearing began, leave to adduce testimony or exhibits whose utility or necessity had not been appreciated sooner. At most, it would have obligated him to satisfy the law judge that he had good

[3]The assurance in Section 821.55(f), 49 C.F.R. Part 821, that motions to compel production "will be promptly decided" must be read in the context of the rule's expectation that "given the short time available" in an emergency proceeding, "the parties...[will] cooperate to ensure timely completion [of discovery] prior to the hearing." We do not think a party's unintended or inadvertent failure to complete discovery in advance of the hearing establishes a lack of cooperation.

cause for not producing by the deadline the names of the new or substitute witnesses and a description of any exhibits they might sponsor, and, if the law judge were so persuaded, the respondent would have to determine whether he needed to request any additional time to prepare his defense given the allowed changes in the Administrator's proposed proof.[4]

Counsel for the Administrator advised the law judge that he did not recognize until shortly before the hearing that the inspector he intended to call with regard to the allegations in the complaint lacked direct knowledge about two administrative actions involving the respondent. Respondent does not here argue that he needed more preparation time in order to effectively cross examine the two inspectors the Administrator proposed to call who did have first-hand information about the circumstances surrounding the administrative actions, which were described in documents provided in answer to respondent's discovery requests, or that the Administrator either did not give an adequate reason for not identifying the inspectors as potential witnesses sooner or unreasonably delayed notifying respondent once he decided that he should call them.[5] Rather, the respondent appears to believe

[4]Although respondent characterizes the two inspectors as surprise witnesses, they were called to testify with respect to matters that were included in discovery information that had been provided to the respondent more than two weeks before the hearing.

[5]At the hearing, the respondent objected to the two late-noticed inspectors on grounds of surprise, in that they were not named as potential witnesses in the material sent to him by the Administrator on February 20, and of relevancy. The latter basis is not pressed in respondent's appeal to us.

that whether the late identification of the witnesses actually prejudiced his ability to defend against the Administrator's charges is of no consequence if the law judge did not fulfil his duty to rule on the motion to expedite. We disagree. We think that since no unfairness to respondent has been shown to have resulted from the Administrator's belated decision to call witnesses who could testify from direct knowledge about matters contained in his discovery submission, whatever error the law judge may have committed in not ruling on respondent's motion must be deemed harmless.[6]

Respondent further contends on appeal that the Administrator cannot be found to have proved the falsification charge because he only provided samples of respondent's handwriting for the law judge to compare with the handwritten document referenced in paragraph 16 of the complaint. According to respondent, since both he and Mr. Crowley denied writing that document, which is part of Adm. Exh. 10, the Administrator had to provide a sample of Mr. Crowley's handwriting for the law judge to have sufficient evidence to support a determination that Mr. Crowley did not

[6]Respondent also asserts that because the Administrator did not produce the names of the two inspectors by February 20 he was denied an opportunity to review two exhibits that were sponsored by one of the inspectors. It is not clear to us what additional review respondent needed to perform. The respondent essentially admitted authorship of the two exhibits, A-13 and A-14, which are brief handwritten letters or statements to the sponsoring inspector with regard to respondent's participation in certain remedial training he had agreed to take. See Transcript at 295. One of the exhibits was drafted and signed in the inspector's presence. Obviously, uncontested handwriting exemplars such as these are not the kind of evidence a party might reasonably insist necessitated more time to review or evaluate.

author Exh. 10. Respondent is mistaken for a variety of reasons.

In the first place, there *was* a sample of Mr. Crowley's handwriting in the record for the law judge to compare with the document allegedly written by that witness; namely, Adm. Exh. 12, which is the letter Mr. Crowley wrote to the inspector investigating this case to deny that he had written the maintenance inspection signoff Adm. Exh. 10 purports to contain. It does not, in our judgment, and apparently that of the law judge, bear the remarkable resemblance to the handwriting in that exhibit that is reflected in respondent's handwriting in Adm. Exhs. 13 and 14. In the second place, it was not part of the Administrator's burden of proof in this case to prove that Mr. Crowley did not write the handwritten portion of Adm. Exh. 10. It was his burden to prove that respondent did. Third, and most importantly, the law judge's violation findings reflect his resolution of the credibility issue that the conflicting testimony of respondent and Mr. Crowley presented. While the degree to which the handwriting samples influenced the law judge's credibility assessment is not explained in his decision, it was clearly made with awareness of all the relevant factors bearing on the self-interests and motivations each of the two individuals might have had in testifying as he did.[7] The

[7]In this connection we note that it is evident from Mr. Crowley's testimony that he understood that the document respondent produced as reflecting Mr. Crowley's ferry flight signoff falls woefully short of meeting regulatory standards relating to form, content and placement of such a maintenance record. Consequently, his own certificate could have been in jeopardy if the Administrator believed he had authored the

respondent has not identified any reason which would justify secondguessing the law judge's determination on who was telling the truth, especially where, as here, it accords with the weight of the evidence on that issue.

Among the factors that support the conclusion that it was the respondent, not Mr. Crowley, who created the handwritten part of Adm. Exh. 10 are these: Respondent alone had the duty to ensure that the requirements of the condition notice were met before his aircraft was moved, whether or not a ferry permit were needed to relocate the aircraft for repairs. Despite this obligation, respondent flew his aircraft at least once (from Dansville to Geneseo) without compliance with the inspection requirement imposed by the condition notice. At the very least, this conduct suggests that he would not be deterred, by any pertinent regulatory prohibition, from flying his aircraft a second time (from Geneseo to Syracuse) in disregard of the inspection requirement which was a condition of the ferry permit. It was also respondent who, in direct response to an FAA inspector's repeated demands that he provide proof that his aircraft had been inspected before it had been flown on the Geneseo to Syracuse ferry flight, eventually tendered a handwritten note purporting to have been signed by Mr. Crowley, along with a typewritten note advising that Mr. Crowley had moved from New York to Georgia. Since Mr. Crowley, a certificated mechanic who had worked very briefly for respondent on an

(..continued)
handwritten part of Adm. Exh. 10.

aircraft restoration project and who appears to have left that employment amicably, denied having inspected the aircraft for any maintenance purpose, much less for doing so to support a written approval for it to be flown pursuant to a ferry permit, had not in fact left the area, it is not unreasonable to infer that the respondent's motive for advising the FAA that he was no longer in New York was to create a disincentive for the inspector to hunt Mr. Crowley down so that he could verify the bona fides of the ferry permit inspection approval on which his name appeared.

While it is of course possible that Mr. Crowley denied writing the approval out of belated concern that it did not comply with regulations, we tend to discount that possibility. There is no suggestion that any inspection that Mr. Crowley, or anyone else, might have done before the ferry flight had been deficient in any way, such that it was not safe to have flown the aircraft to Syracuse for a more thorough maintenance review. To the contrary, respondent testified that before he flew the aircraft from Dansville to Geneseo, he had replaced a fuel hose that he believed had caused the leak for which the aircraft had been grounded with a condition notice.[8] Inasmuch as the maintenance facility in Syracuse, after respondent flew the aircraft there from Geneseo, approved it for return to service without making any repairs, we think it doubtful that a possible paperwork violation would prompt Mr. Crowley to deny having

[8]Respondent had not taken responsibility for this repair before the hearing, advising the Administrator only that some "unknown" agency had accomplished the maintenance.

inspected the aircraft.[9] It is also improbable, we think, that Mr. Crowley, if he had inspected the aircraft, would leave a writing to that effect among the aircraft's records without ever so advising the respondent and that the writing would just turn up, after the flight had been made, in response to *respondent's* need to furnish such proof the Administrator.

In sum, even if the respondent's handwriting and the writing on the ferry flight approval did not appear to be a near perfect match, we think it more likely than not on the evidence of record that respondent wrote the approval and forged the signature of Mr. Crowley on it.

[9]Inasmuch as there does not appear to be any evidence in the record to contradict respondent as to when he replaced the hose, and no indication that the aircraft had any other discrepancy at that time affecting its airworthiness, we question the validity of the conclusion that respondent flew the plane twice when it was not airworthy, contrary to the proscription in FAR section 91.7(a). Nevertheless, this issue was not raised by the respondent on appeal or expressly litigated by the parties at the hearing, and dismissal of that charge would have no bearing on the appropriateness of the sanction of revocation in this matter for the remaining violations found proved. It may be, of course, that the testimony on the timing of this repair was not credited by the law judge.

ACCORDINGLY, IT IS ORDERED THAT:

1. The respondent's appeal is denied, and

2. The emergency order of revocation and the initial decision are affirmed.

HALL, Chairman, FRANCIS, Vice Chairman, HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above opinion and order.